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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-190

ISADORE H. BELLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (Pet. App. A1–A10)[1] is not officially reported. The opinion of the court of appeals (Pet. App. A13–A16) is reported at 483 F. 2d 961.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1973 (Pet. App. A17; A. A4). A petition for rehearing was denied on July 20, 1973 (Pet. App. A18; A. A4). The petition for a writ of certiorari was filed on July 27, 1973, and was granted on October 15,

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari; "A." references are to the separately bound record appendix.

1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a former partner in a dissolved law partnership is entitled to invoke the Fifth Amendment privilege against self-incrimination as a ground for refusing to comply with a grand jury subpoena to produce business records maintained by the partnership while he was a member, where the records had come into his possession after the dissolution.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the Fifth Amendment of the United States Constitution states:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

On May 1, 1973, a federal grand jury subpoena (A. A6) was served upon petitioner, directing him to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." Petitioner appeared before the grand jury on May 9, 1973 (A. A8), but refused to produce the requested documents, on the ground that under "the First, Fourth, Fifth, and Sixth amendments * * * I can not be compelled to be a witness against myself, and the books and records may contain private, testimonial and personal statements and information which might be considered as so doing"

(A. A9).[2] For the same reason he also refused to state whether he had the documents called for by the subpoena (A. A10).

The government thereupon proceeded in the district court to enforce the subpoena (A. A30–A31). The evidentiary hearing in the district court established that in 1968 and 1969 petitioner was the senior partner and 45 percent interest owner in Bellis, Kolsby & Wolf, a three-partner law firm located in Philadelphia, Pennsylvania. The partnership was formed in 1955 or 1956 and consisted of three attorneys who were partners, one attorney who was an employee, three or four secretaries, and a young man who did the firm's "City Hall work" (A. A82–A83, A87, A89). Petitioner's secretary, Harriet Lipman, whom he periodically supervised, served as the partnership's office manager and bookkeeeper (A. A82, A83). As bookkeeper, she made the entries for the partnership's receipts and disbursements, wrote checks on a regular account under the partnership name "Bellis, Kolsby and Wolf," and performed other duties under the supervision of William Blumberg, the firm's outside accountant (A. A83, A91, A93). She also made entries for the personal transactions and expenses of the individual partners, which were sometimes reflected in the partnership books (A. A83–A84).[3] Petitioner,

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[2] Following his initial appearance before the grand Jury, petitioner relied solely upon the Fifth Amendment privilege against self-incrimination (see, *e.g.*, A. A22–A28, A63–A76, A108–A114).

[3] On occasion, Mrs. Lipman was told to pay country club and restaurant bills with partnership checks (A. A92–A93). The bills usually itemized personal and business expenses; the

the two other partners, Mrs. Lipman, and Mr. Blumberg and his staff all had access to the partnership books and records (A. A91).[4]

In late 1969 or early 1970, the partnership was dissolved,[5] and petitioner and Mrs. Lipman left its premises (A. A84, A95). Petitioner joined another law firm and Kolsby and Wolf continued in business together at the same premises (A. A12). The business records of the dissolved partnership had always been kept in petitioner's room (A. A85). When the partnership was dissolved, Mrs. Lipman asked petitioner whether they should take the records with them. That was not done because, as Mrs. Lipman stated, "we had such limited space [in petitioner's new quarters] we didn't know what we were going to do so we decided to leave them" in the old office (A. A84–A85). After petitioner left the old office, the records were located in a room occupied by Kolsby (A. A87).

Thereafter, Mrs. Lipman would often telephone petitioner's former partners and ask them to look up certain things for her in the records. From time to

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personal expenses would be charged to the drawing account of the particular partner involved (A. A92–A94).

[4] Blumberg, the outside accountant, prepared the partnership tax returns and also performed audits (A. A94, A101).

[5] From the date of the dissolution to the close of the evidentiary hearing, petitioner and his former partners continued to settle cases of their former partnership and remitted to each other the appropriate portion of the funds involved (A. A87–A88, A98). Petitioner states (Br. 3) that the Bellis, Kolsby & Wolf partnership is still in the process of being wound up.

time, at petitioner's request, she would also go to the old office to get information from the records or to bring back files which petitioner needed (A. A85, A95–A96). Kolsby and Wolf knew that she was taking the records, as did Mr. Kolsby's secretary and also the bookkeeper of the new partnership (A. A86–A87). On one occasion she informed Mr. Kolsby that she was taking the records; she did not tell him that she was not going to return them, and he did not ask her whether they would be returned (A. A87, A97–A98).

In late February or early March of 1973, petitioner or Mr. Lipschitz, one of his attorneys in this case, instructed Mrs. Lipman to bring to petitioner's office the records involved in this proceeding (A. A86). After telephoning Mr. Kolsby's secretary, Mrs. Lipman "took what [she] could carry" from the old office (A. A86), completing the removal of the records in four or five trips over approximately one week (A. A98). The records removed at that time probably included the firm's cash receipts and accounts receivable ledgers for 1968 and 1969 (A. A92, A98–A100). The accounts receivable ledger recorded fees due from insurance companies and from retainer clients for services rendered by the partnership (A. A100–A101).

During April 1973, Kolsby and Wolf gave their permission for the grand jury to examine the partnership records of Bellis, Kolsby & Wolf for 1968 and 1969. However, when they discovered that these records had been removed from their office in late

February or early March 1973, they made an unavailing demand on petitioner to return the records (A. A13).[6]

The district court ordered compliance with the grand jury subpoena, specifically directing that petitioner "turn over any cash receipt books, cash disbursement books or books of records and accounts of the partnership for the years in question." It expressly excluded, however, any confidential client files from the scope of its order (A. A116). On "the premise that the [Fifth Amendment] privilege is entirely personal" (Pet. App. A7), the district court held that "the records in this case are beyond the pale of the personal privilege" (*ibid.*) because (A. A116)—

> the cash receipt books, cash disbursement books, or any books and records showing the financial situation of the partnership * * * are records of the partnership, they are under the partnership law of Pennsylvania subject to any agreements between the partners to be

[6] These facts were alleged in a memorandum in support of the government's motion to compel the production of the partnership records (A. A13) and were not denied in petitioner's memorandum supporting his motion to quash the subpoena (A. A24–A28). At the evidentiary hearing on May 10, 1973 (A. A62), the government moved for permission to disclose Kolsby's testimony to the grand jury under Rule 6(e) of the Federal Rules of Criminal Procedure (A. A102). The district court denied the motion, indicating, however, that Kolsby could be called as a witness (A. A103). The government stated that it saw no need to do so at that time and that it was prepared to argue petitioner's motion to quash the subpoena (A. A104).

> kept at the principal place of the partnership and every partner shall at all times have access to and may inspect and copy any of them and, therefore * * * they are not the personal records of any one particular partner * * *.

On May 16, 1973, petitioner reappeared before the grand jury and again refused to produce the subpoenaed documents (A. A123–A125). The district court held him in civil contempt (Pet. App. All; A. A130). Petitioner was released on his own recognizance pending appeal (A. A2, A130–A131). The court of appeals affirmed. It held that requiring petitioner to comply with the subpoena involved no violation of his Fifth Amendment privilege against self-incrimination since "the privilege has always been regarded as personal in the sense that it applies only to an individual's words or personal papers" and "was not intended * * * to apply to the possession of records of an entity such as a partnership which has a recognizable juridical existence apart from its members" (Pet. App. A15–A16).[7]

SUMMARY OF ARGUMENT

As the Court reaffirmed last Term in *Couch* v. *United States,* 409 U.S. 322, the Fifth Amendment privilege against self-incrimination is an intimate and

[7] The court of appeals denied petitioner's motion to stay issuance of the mandate and directed issuance thereof on August 1, 1973 (A. A4–A5). On that date, Mr. Justice White stayed issuance of the mandate pending final disposition of the case by this Court (A. A5).

personal right. While the Court has extended it to cover books and records, it has made clear that only personal records are eligible for the claim. The Court has repeatedly rejected the claim of the privilege by a corporate officer with respect to the books and records of the corporation even if they incriminate the officer personally. The basis of these decisions is that the officer's possessory interest in the records is merely that of a custodian on behalf of the corporation, rather than personal dominion.

In *United States* v. *White,* 322 U.S. 694, the Court extended the rationale of its decisions respecting books and records of a corporation to those of an unincorporated association. It concluded that a member of such an association holding the books and records of the organization in a representative, rather than a personal, capacity could not invoke the privilege. In so holding, the Court noted the essential similarity in nature and function between corporations and many unincorporated associations. It drew the analogy between a shareholder's right to inspect the books and records of his corporation and a member's right to gain access to his association's records. As a result, such records do not contain the requisite element of personal privacy to which the privilege against self-incrimination can attach.

In announcing a test of general application, the Court in *White* stated that the privilege did not apply to those organizations which were so impersonal "in the scope of its membership and activities that it cannot be said to embody or represent the purely

private or personal interests of its constituents, but rather to embody their common or group interests only." 322 U.S. at 701. Petitioner urges that under this test the records of a three-partner law firm are protected by the privilege. The Court's formulation, however, cannot be reduced to a simple proposition based upon the size of the organization, since it refers to the *scope* of membership *and* activities.

The legal attributes of a business or professional partnership give it an independent group identity which differs significantly from the personal interests of its members. Confidential communications between partners are not privileged from compelled disclosure, and all members of the partnership have a legal right of access to the partnership's books and records. A partnership, therefore, is not "a private enclave" in which each member is legally entitled to "lead a private life * * *" (*Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55). It follows that, like the custodian of other associational or of corporate records, the custodian of partnership records is not entitled to invoke the privilege against self-incrimination as a bar to their production.

Moreover, here, despite the fact that the persons who had a financial interest in petitioner's partnership were few in number, the record demonstates that the association maintained an independent group identity. The partnership held itself out as such to third parties and was continuously engaged in the active practice of law for almost 15 years until its dissolution. In addition to its three partners, the firm had one attorney-employee and five other employees.

In addition, petitioner's conduct with respect to the particular records at issue was so casual as to be hardly consistent with his claim of personal privacy in them. Not only did he freely permit his partners, his secretary, and his accountant and the accountant's staff to gain access to the records, he also left them with his former partners for more than three years after he departed from their offices. He removed them only shortly before the issuance of the grand jury subpoena, and had he not removed them his partners would have voluntarily turned them over to the grand jury. In these circumstances it would be especially inappropriate to permit petitioner to raise the bar of the privilege simply on account of his physical possession of the records. Petitioner's possession was correctly deemed to be in a representative capacity on behalf of the partnership. His claim of the privilege was therefore properly rejected by both courts below.

The decision below is further supported by both the Uniform Partnership Act, applicable in virtually every state, and the partnership provisions of the Internal Revenue Code. Under both of these statutory systems, partnerships are treated as independent legal entities for many significant purposes. Thus, the decision below comports with modern realities of the law of partnerships, as well as with this Court's Fifth Amendment jurisprudence.

ARGUMENT

A FORMER PARTNER OF A DISSOLVED PARTNERSHIP MAY NOT INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION AS A GROUND FOR REFUSING TO PRODUCE PARTNERSHIP BUSINESS BOOKS AND RECORDS IN HIS POSSESSION

A. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT APPLY TO POSSESSORY INTERESTS IN BOOKS AND RECORDS WHICH ARE NOT HELD IN A PURELY PERSONAL CAPACITY

1. In this case, the district court ordered petitioner, pursuant to a grand jury subpoena, to produce certain of the dissolved partnership's books and records which were in his possession. In response, he contends that the order violates his Fifth Amendment privilege not to "be compelled * * * to be a witness against himself." In order for that claim to prevail, however, petitioner must show that the partnership books and records were his "private property" or at least held by him "in a purely personal capacity." *United States* v. *White*, 322 U.S. 694, 699.

The books and records in question, we submit, do not fit within either category. They were plainly not petitioner's private property, for his other partners had equal rights in and access to them and exercised those rights until petitioner physically took the books and records away from them. Moreover, despite petitioner's attempts to subject the books and records to his exclusive dominion and control, he did not hold them in a purely personal capacity. To the contrary, he held them in his

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capacity as a partner, a representative of the partnership, the business transactions of which were reflected upon the books and records at issue. Thus, their production will not encroach upon petitioner's purely private and personal interests which are alone protected by the privilege against self-incrimination.

2. As this Court observed last Term in *Couch* v. *United States,* 409 U.S. 322, 327, with respect to the Fifth Amendment privilege against self-incrimination:

> By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation. Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth.

Although the Fifth Amendment's privilege against compulsory self-incrimination was arguably meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding, this Court in *Boyd* v. *United States,* 116 U.S. 616, held that a person could not be compelled to produce his private written statements in his possession that might tend to incriminate him.[8]

[8] This result has been criticized in Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U.Cin.L.Rev. 671, 701–703 (1968). The author argues that the production of documents, as contrasted with oral testimony, ought not to be protected by the privilege against self-incrimi-

Three elements were present in *Boyd* to support the claim of privilege: (1) the papers were within the personal possession of the person claiming the privilege; (2) they were the private property of that person (see n. 11, *infra*); and (3) if produced, the papers might tend to incriminate him. All three of these elements must exist for the privilege to be applicable. Thus, for example, if B is in possession of A's records and if the production of these records will incriminate both A and B, neither party can assert the privilege with respect to the books. A, while he can assert ownership and self-incrimination, is not protected by the privilege because he is not in possession of the records. This is the teaching of *Couch* v. *United States, supra,* where the Court held that where the owner of books and records transferred them to an accountant, she could not invoke the privilege as a bar to the production of the records by the accountant. In these circumstances, the Court concluded, "the ingredient of personal compulsion against an accused is lacking" (409 U.S. at 329).[9]

Returning to the example, the privilege is similarly not available to B. While B can assert physical possession and self-incrimination, he cannot assert ownership of the records. His possession is therefore

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nation. See also *Grosso* v. *United States*, 390 U.S. 62, 76–77 (Stewart, J., concurring).

[9] The example is not intended to extend to "situations * * * where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *Couch*, *supra*, 409 U.S. at 333. See, also, *id.* at 337 (Brennan, J., concurring).

custodial rather than personal. The present case is a variation of this part of the example in the context of a partnership. Under analogous circumstances, the Court has rejected claims of the privilege against self-incrimination. For example, in *Wilson* v. *United States,* 221 U.S. 361, it held that a corporate officer holding corporate books in his custody could not decline to produce them pursuant to a subpoena duces tecum. In accordance with the fundamental premise that the privilege against self-incrimination is personal in nature, the Court in *Wilson* held the privilege unavailable because the books were corporate records maintained by the claimant in his capacity as an officer of the corporation rather than his private papers as in *Boyd.*

This Court has recognized that the significant aspect of *Boyd* was that the documents in question were the private papers of the person claiming the privilege,[10]

[10] The order to produce in *Boyd* was in fact issued to E. A. Boyd & Sons, a partnership. But contrary to petitioner's contention (Br. 17), *Boyd* is not authority for the proposition that partnership records, as such, are subject to the privilege against self-incrimination. The question whether the invoice at issue in *Boyd* was a private business record was not raised. It was treated as private by the parties (with the government arguing instead that the privilege did not apply to *in rem* proceedings, see *Shapiro* v. *United States*, 335 U.S. 1, 33 n. 42), and the Court therefore decided the case on the premise that it involved "compulsory production of a man's private papers * * *." 116 U.S. at 622; see *id.* at 630, 633. Thus, in extracting the essential passage from the *Boyd* opinion which was descriptive of its holding, the Court in *Couch* cited *Boyd* as deciding that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" (116 U.S. at 630) would violate the Fourth and Fifth

and thus were held by him in a personal capacity. As the Court noted in *Couch* v. *United States, supra,* "A later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.' United States* v. *White,* 322 U.S. 694, 699 (1944) (Emphasis added.)" (409 U.S. at 330, n. 10).

Here, petitioner is holding the partnership's books and records subject to fiduciary obligations to the other partners who are their co-owners and have a legal right of access to them.[11] The mere fact that petitioner, as one of the partners, is also a co-owner of the partnership books and records, therefore, does not mean that he is holding them in the requisite personal capacity to entitle him to invoke the privilege. His possession lacks the right to exclude others that is the characteristic attribute of "a private enclave where he may lead a private life * * *" (*Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55), and is instead essentially representative in nature. These are *the partnership's* books and records, rather than his own personal, private papers. Accordingly, petitioner, as their custodian, is not privileged to refuse to produce them unless the nature of the partnership's associational relationship warrants extension of the privilege

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Amendments. See 409 U.S. at 330. See also *Wilson* v. *United States,* 221 U.S. 361, 380; *United States* v. *Onassis,* 125 F. Supp. 190, 208 (D. D.C.).

[11] See p. 23, *infra.*

beyond its established personal bounds. That is the question to which we now turn.

B. THE PRIVILEGE AGAINST SELF-INCRIMINATION IS PERSONAL IN NATURE AND DOES NOT EXTEND TO THE BOOKS AND RECORDS OF CORPORATIONS, PARTNERSHIPS AND OTHER UNINCORPORATED ASSOCIATIONS HELD BY REPRESENTATIVES OF SUCH ENTITIES

1. In *Hale* v. *Henkel,* 201 U.S. 43, the Court held that the Fifth Amendment privilege against self-incrimination does not protect a corporation against the production of its records pursuant to a grand jury subpoena. The principal ground of the decision was the distinction between an individual who, as a natural person, is protected by the privilege, and a corporation which is not so protected. See *Campbell Painting Corp.* v. *Reid,* 392 U.S. 286, 288–289. In drawing this distinction the Court stated that an individual "may stand upon his constitutional rights as a citizen," is "entitled to carry on his private business in his own way," and "owes no duty to the State or to his neighbors to divulge his business." 201 U.S. at 74. On the other hand, the Court viewed a corporation as "a creature of the State * * * presumed to be incorporated for the benefit of the public" and the recipient of "certain special privileges and franchises" held "subject to the laws of the State and the limitations of its charter." Accordingly, the legislature was deemed to have "a reserved right * * * to investigate its contracts and find out whether it has exceeded its powers," and that right extended not only to the state of incorporation but also to the federal government for

purposes of "indication of its own laws." 201 U.S. at 74–75.

Similarly, in *Wilson* v. *United States, supra,* the distinction between an individual and a corporation was a principal focus of the Court's holding that a corporate officer summoned to produce corporate records could not invoke his personal privilege against self-incrimination because he held the records in his custodial rather than in a personal capacity.[12] In the Court's view, the *Boyd* decision did not support the officer's claim of privilege because in that case "the fact that the papers involved were the *private* papers of the claimant was constantly emphasized" (221 U.S. at 380) (emphasis in original). Instead, the Court held (221 U.S. at 381–382):

> The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

Accordingly, the Court has refused to extend the privilege to documents which are essentially corporate or organizational in nature, notwithstanding claims

[12] *Hale* v. *Henkel, supra,* had left this question unanswered. The person summoned to produce the records in that case was in no danger of incrimination because he had been granted statutory immunity. See 201 U.S. at 66–69.

by individuals to legal title of the documents involved. Thus, in *Wheeler* v. *United States,* 226 U.S. 478, 482–483, and *Grant* v. *United States,* 227 U.S. 74, 76–77, where the corporations had been dissolved by the time the subpoenas had been served and individual shareholders asserted ownership rights in the documents sought,[13] the Court nevertheless rejected their claims of privilege. It held that the documents retained their "essential character" as corporate documents (226 U.S. at 490; 227 U.S. at 80) and "were still impressed with the incidents attending corporate documents" (226 U.S. at 490), and thus did not qualify as private papers even though the individuals then in possession (or constructive possession, in *Grant*) of them also claimed, and were assumed by the Court, to be their owners (226 U.S. at 490, 227 U.S. at 80).[14]

2. *a.* Although the *Hale, Wilson, Wheeler,* and *Grant* decisions had established the distinction for Fifth Amendment purposes between the papers of natural persons and those of artificial entities, they had all involved books and records of corporations. In *United States* v. *White,* 322 U.S. 694, the Court extended the rationale of those decisions to the books and records of unincorporated associations. There, the Court rejected a claim by an officer of a labor union that he was privileged on self-incrimination

[13] In *Grant*, the subpoena was served on the attorney for the corporation's sole stockholder. See 227 U.S. at 76–77.

[14] Petitioner therefore errs in arguing (Br. 10) that the characterization of documents as "private" or "personal" for Fifth Amendment purposes depends entirely on whether they are individually owned and possessed, without reference to the degree of privacy attending their creation or maintenance.

grounds to refuse to produce the union's records. In so holding, the Court stated that "the records of any organization, whether it be incorporated or not," are not covered by the privilege against self-incrimination, the scope of which is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records" (322 U.S. at 700–701).[15]

In making the transition from a corporation to an unincorporated association, the Court in *White* continued to distinguish between books and records owned by an individual or held by him in a personal capacity for which the privilege is available and those held in a custodial capacity which are not protected by the privilege. With respect to association records held by individuals as custodians, the Court noted (322 U.S. at 699–700) that such records are "[u]sually, if not always, * * * open to inspection by the members" of the association and that "on appropriate occasions" this right of inspection is legally enforceable.[16] Such association records, therefore, con-

[15] The Court specifically denied that the visitorial powers doctrine applicable to corporations was of controlling significance, describing it as merely "a convenient vehicle for justification of governmental investigation of corporate books and records," the absence of which does not "confer upon * * * an organization the purely personal privilege against self-incrimination" (322 U.S. at 700).

[16] Significantly, the Court's discussion refers (322 U.S. at 700) to its prior decision in *Guthrie* v. *Harkness*, 199 U.S. 148, 153, which recognized that the shareholders' right to examine corporate books was supplemental to the state's visitorial power

tain "no element of personal privacy" to which the privilege against self-incrimination could attach (322 U.S. at 700).[17]

b. Having concluded that the records of unincorporated associations are to be treated in essentially the same manner as those of a corporation for purposes of the Fifth Amendment privilege against self-

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and was "* * * the same right as [that of] the members of an ordinary partnership to examine their company's books * * *."

The Court in *White* also cited (322 U.S. at 699) *United States* v. *Invader Oil Corp.*, 5 F. 2d 715 (S.D. Cal.), which held the privilege inapplicable to the records of certain unincorporated commercial trusts. That decision was based in part upon the general requirement of the law of trusts, reflected also in the trust instrument, entitling the various investors to inspect the trust's records. See 5 F. 2d at 717.

[17] Petitioner therefore errs in relying (Br. 14) on the element of possession as emphasized in *United States* v. *Cohen*, 388 F. 2d 464 (C. A. 9). There, the allowance of the claim of privilege was based on the court's holding that the papers in the possession of the claimant's accountant embodied the claimant's "purely personal affairs." *Id.* at 471. But the court recognized that this Court's decisions in *Hale* and *White* established "an exception applicable to the records of a corporation or other impersonal organization," so that "the production of such records may be compelled even though a natural individual claiming privilege has acquired both possession and title." *Id.* at 470–471. See, also, *United States* v. *Egenberg*, 443 F. 2d 512, 518 (C.A. 3). And see American Law Institute Model Code of Evidence, Rule 206:

"No person has a privilege under Rule 203 [self-incrimination] to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control constituting, containing or disclosing matter incriminating him if the judge finds that, by the applicable rules of the substantive law, some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced."

incrimination, the Court in *White* stated that the test is (322 U.S. at 701):

> * * * whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.[18]

Petitioner urges (Br. 16, 25–28) that under this test the records of a three-partner law firm are protected by the privilege. However, the Court's formulation, which refers to the scope of both the membership and the activities of the organization, cannot be reduced to a simple proposition based based upon its size.[19] Indeed, it is difficult to know precisely what situations the formulation in *White* was intended to include within the protection of the privilege, since the Court has never to our knowledge, either before or after that decision, held any particu-

[18] This formulation is, however, essentially dictum to which three members of the Court who noted their concurrence in the result (Roberts, Frankfurter and Jackson, JJ.) apparently did not subscribe.

[19] It is well settled that corporate records, which would tend to incriminate a corporate officer, are not privileged even when the corporation is a mere *alter ego* of its owner. *Grant* v. *United States*, *supra*; *Fineberg* v. *United States*, 393 F. 2d 417 (C.A. 9); *Hair Industry, Ltd.* v. *United States*, 340 F. 2d 510 (C.A. 2). Cf. *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286.

lar organizational or associational records to be subject to a claim of the privilege by their custodian.

One possibility that occurs to us, if the *White* test is to be given meaningful content, would be to make the test coextensive with associational relationships with respect to which the law recognizes testimonial privileges. For, in the absence of testimonial privilege, there ordinarily would be little purpose served by honoring a self-incrimination claim by one member of the group with respect to the group's records, since the government could instead compel their production by another member who could not claim that their production would tend to incriminate him (whether because of a grant of immunity or because such a claim would otherwise be without factual basis).[20] And whether confidential communications between members of the group are protected from compulsory disclosure does seem highly relevant to the question whether the associational relationship can accurately be characterized as "a private enclave" where the members are legally entitled to "lead a private life * * *" (*Murphy* v. *Waterfront Commission, supra,* 378 U.S. at 55). Perhaps under the test the privilege might also be assertable by the custodian of the records of an informal group, such as an ordinary criminal conspiracy, with respect to which the law recognizes no rights among the members (and in which it is therefore unclear whether the records

[20] The association would not be entitled to frustrate his compliance with legal process by attempting to cut off his right of access to the records. See *Couch, supra,* 409 U.S. at 329 n. 9.

meaningfully "belong to" anyone other than their custodian at any given time).

No such factors are present with respect to the business records of a partnership, such as those at issue here. It is well established that confidential communications between partners are not privileged from compelled disclosure. 8 Wigmore, *Evidence* (McNaughten rev.) § 2286; see *United States* v. *Onassis,* 133 F. Supp. 227, 331–332 (S.D. N.Y.). See, also, 59 Purdon's Pa. Stat. Ann., § 33 (providing that an admission or representation made by any partner concerning partnership affairs within the scope of his authority is evidence against the partnership). Moreover, under Pennsylvania law, partnership books and records are required to be maintained and made available for inspection by all the partners (59 Purdon's Pa. Stat. Ann., § 52), the partners are required to render among themselves any information pertaining to the partnership business (59 Purdon's Pa. Stat. Ann. § 53), and any partner is entitled to an accounting with respect to any transaction connected with the conduct or liquidation of the partnership (59 Purdon's Pa. Stat. Ann. § 54).

These legal attributes of the partnership relationship, common to all partnerships, are, in our view, more significant for purposes of the question presented in this case than are the numerous possible differences in the size of partnerships or their manner of conducting business. Indeed, on all the occasions since *White* when this Court has considered the issue, it has held that the records of an unincorporated as-

sociation were not privileged under the Fifth Amendment without discussion of the number of members of the organization. See *McPhaul* v. *United States,* 364 U.S. 372, 380; *Curcio* v. *United States,* 354 U.S. 118. See, also, *Campbell Painting Corp.* v. *Reid, supra; Rogers* v. *United States,* 340 U.S. 367; *United States* v. *Fleischman,* 339 U. S. 349; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186. While none of these cases involved partnership records, the legal attributes of partnerships (which are discussed further at pp. 29–33, *infra*) give them an independent group identity which does not differ significantly for present purposes from the characteristics of associations such as, for example, the Civil Rights Congress involved in *McPhaul.* Accordingly, even though the district courts have divided on the issue,[21] all the courts of appeals which have considered the question have agreed with the court below that the privilege does not apply to partnership records, at least in the situations then before each court. *In re Mal Brothers Contracting Co.,* 444 F. 2d 615 (C.A. 3), certiorari denied, 404 U.S. 857; *United States* v. *Silverstein,* 314 F. 2d 789 (C.A. 2), certiorari denied, 374 U.S. 807;[22]

[21] The cases are collected in petitioner's brief (p. 29, n. 11).

[22] There the court upheld against a claim of the privilege an order enforcing an Internal Revenue summons directed against one of *three general partners,* all of whom were members of the *same family,* who directed a real estate and rental management enterprise. Although the court noted that the considerable size of the business and the interests of numerous limited partners in each of the ventures made it analogous to a group of cor-

United States v. *Wernes*, 157 F. 2d 797 (C.A. 7).[22]

It is our submission, in short, that the records of a business or professional partnership, like those of a corporation or of a labor union or other association, are not subject to a claim of the privilege against self-incrimination by their custodian as a ground for resisting their production. Moreover, as we shall now show in detail, the particular partnership books and records involved here reflect the business of the partnership entity rather than any personal and private interests of petitioner as an individual.

C. THE BOOKS AND RECORDS AT ISSUE HERE REFLECT THE PARTNERSHIP BUSINESS RATHER THAN ANY PERSONAL OR PRIVATE INTEREST OF PETITIONER AS AN INDIVIDUAL

The grand jury subpoena at issue here in this case applies only to "partnership records * * * for the partnership of Bellis, Kolsby & Wolf * * *" (A. A6). Despite the fact that the persons who had a financial

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porations, the records of which are not privileged, it nevertheless drew the *White* distinction between purely private or personal records and the representative possession of records of "corporations, limited partnerships or other entities." 314 F. 2d at 791.

[23] A recent district court decision, *In re Grand Jury Subpoena Duces Tecum*, 358 F. Supp. 661 (D. Md.), involved facts almost identical to those in the instant case. In a thoughtful opinion discussing the relevant authorities in some detail, the court rejected the asserted claim of privilege and the privilege-claimant's contention that "a law firm having four partners is a small personal organization merely because it has only four members" (358 F. Supp. at 666). It held that because of the legal attributes of a partnership, reflected in the Uniform Partnership Act (applicable in that case as it is here), "any records belonging to the partnership are possessed by a partner in a purely representative capacity" (358 F. Supp. at 668).

interest in the Bellis, Kolsby, and Wolf partnership were few in number, the essential nature of the association does not support petitioner's claim of privilege with respect to the partnership books and records. Petitioner urges (Br. 26–27) that his former partnership was intimate and reflected only the personal interests of the members. But these are bare assertions without support in the record. It was, of course, incumbent on petitioner to introduce sufficient evidence to show that he qualifies as a proper person to claim the privilege.

In any event, the record effectively refutes the existence of an intimate and personal association. To begin with, the partnership in question was not an informal association or a temporary arrangement for the undertaking of a few projects of short-lived duration. Rather, it was a formal arrangement organized for the active conduct of a trade or business and had been in existence for almost 15 years prior to its dissolution.[24] During that period, it maintained

[24] Petitioner concedes (Br. 31, n. 12) that the fact of the dissolution of the partnership does not afford him any greater claim to the privilege. Under Pennsylvania law (59 Purdon's Pa. Stat. Ann. § 92), the dissolution of the partnership does not of itself completely terminate the entity; it continues until the winding up of the partnership affairs, which petitioner states (Br. 3) has not yet been completed.

Moreover, the result would appear to be the same in any event under this Court's decision in *Grant* v. *United States*, *supra*, holding that the records of a dissolved corporation in the possession of its sole shareholder are not eligible for the privilege because the records retain their "essential character" as corporate documents (227 U.S. at 80). See also *Wheeler* v. *United States*, 226 U.S. 478, 490; *Curcio* v. *United States*, 354 U.S. 118, 122.

a bank account in the name of the partnership, had firm stationery, and thereby held itself out to third parties as an impersonal entity with an independent group identity (A. A83, A91, A93). During the period of its existence, the revenues of the firm supported three attorney-partners, who were not related to each other by family ties, one attorney-employee, three or four secretaries, and an additional person employed for miscellaneous duties (A. A82–A83, A87, A89).

Moreover, the books and records at issue were maintained in a manner which indicates that they were ordinary partnership records rather than petitioner's own personal papers. A variety of persons other than petitioner were given access to the records, including his two partners, his secretary-office manager, his accountant, and the accountant's staff (A. A91).[25] The two other partners had, and continue to have, the legal right of access to the records and can subpoena them in a suit for an accounting (see p. 23, *supra*). Cf. *Perlman* v. *United States,* 247 U.S. 7; *Dier* v. *Banton,* 262 U.S. 147.

Indeed, the record here shows much more than an unexercised legal right of petitioner's two partners to inspect the records. The evidence (summarized in the Statement, *supra*) shows that petitioner's conduct with respect to the records was so casual as to be hardly consistent with his claim of privacy in them. Not only did he freely permit his partners and others

[25] There is of course no confidential accountant-client privilege under federal law and no state-created privilege has been recognized in federal cases. See *Couch* v. *United States*, *supra*, 409 U.S. at 335, and cases cited therein.

to gain access to the records, he left them with his former partners for a period of more than three years after he departed from their offices. In so doing, petitioner abandoned control over the records and in effect allowed anyone to have access to them.[25] During that period, the records were physically located in the office of Kolsby—hardly a private enclave of petitioner's—and petitioner's secretary freely consulted with his former partners with respect to details in the books and records. They were removed from Kolsby's office only in late February or early March 1973, shortly before the issuance of the grand jury subpoena on May 1, 1973.

To be sure, Kolsby and Wolf knew when petitioner's secretary began to remove the records from their offices and made no objection at that time (A. A86–A87, A97–A98). But there was no understanding on anyone's part that the books and records would not be returned—let alone that they were petitioner's personal papers. Moreover, the record further indicates that Kolsby and Wolf unsuccessfully tried to make the partnership records available to the grand jury (A. A13). It hardly seems appropriate to permit petitioner to raise the bar of the privilege simply on account of his physical possession of the records when his part-

[25] Although petitioner speculates (Br. 12) that under the government's argument he could "never let the books out of his sight," the facts here demonstrate that the removal of the books from his dominion and control "was no mere fleeting divestment of possession * * *." *Couch*, *supra*, 409 U.S. at 334. Nor were petitioner's former partners holding the books in a custodial capacity for him. Cf. *United States* v. *Guterma*, 272 F. 2d 344 (C.A. 2).

ners, who have equal rights in the records, wished to cooperate with the grand jury investigation. Indeed, the contrast between petitioner's refusal to comply with the subpoena and his partners' willingness to cooperate is in itself a confirmation that the partnership is not a mere extension of petitioner's personal interests, but is instead a business association whose records petitioner holds in a mere custodial capacity. Petitioner's claim of privilege with respect to these records was therefore correctly rejected by both courts below.

D. ADDITIONAL ASPECTS OF THE LAW OF PARTNERSHIPS AND THEIR TAX TREATMENT UNDER THE INTERNAL REVENUE CODE PROVIDE FURTHER SUPPORT FOR THE DECISION BELOW

In light of the foregoing discussion, we submit that the legal attributes of petitioner's partnership relationship, as well as his conduct with respect to the maintenance of the books and records at issue, effectively refute his claim to the privilege under this Court's *White* and *Couch* decisions. There are, however, additional aspects of the law of partnerships and their federal tax treatment which provide further support for the conclusion that a partnership is a juridical entity independent of its members, not substantially different from a corporation[37] or other association for Fifth Amendment purposes.

[37] We note the growing tendency of professional men such as lawyers and physicians to conduct their business affairs as a corporation. Indeed, every state has now enacted professional incorporation statutes. See BNA Tax Management Portfolio No. 227, *Professional Organizations—General Coverage*, p. A–40 and p. 3 of Changes and Additions (1973 ed.).

For example, the Uniform Partnership Act, as enacted in Pennsylvania,[28] essentially regards a partnership as a collective organizational entity with a disparate form of management and established legal procedures for the resolution of disputes among its members. See, *e.g.*, 59 Purdon's Pa. Stat. Ann., § 51 (e) and (h). Such institutionalized procedures at the least indicate that the law contemplates no necessary identity of interest between one partner and the partnership itself, and that no individual partner is entitled to singular control or unqualified privacy with respect to partnership books and records.

So much is in any event clear from the fact that individual partners have no immediate or direct interest in partnership property. 59 Purdon's Pa. Stat. Ann., §§ 13, 71–73; *Ellis* v. *Ellis*, 415 Pa. 412, 415–416, 203 A. 2d 547, 549–550. Rather, under Pennsylvania law and the law of partnerships generally, partnerships can hold and sell property in their own name and such property belongs to the partnership. 15 Purdon's Pt. Stat. Ann. § 12773. "[T]he interest of each partner is a resulting interest, the value of which can be ascertained only by an accounting." *Zion* v. *Sentry Safety Control Corp.*, 258 F. 2d 31, 34 (C.A. 3). See *Clarke* v. *Railroad Co.*, 136 Pa. 408, 409–410, 20 Atl. 562. Although a partner is a co-owner of specific partnership property as a tenant in partnership, he has "an equal right with his partners to possess spe-

[28] The Uniform Partnership Act has been adopted in 41 States and the District of Columbia. The exceptions are Alabama, Florida, Georgia, Hawaii, Kansas, Louisiana, Maine, Mississippi and New Hampshire. See Uniform Laws Annotated, Uniform Partnership Act, 1972 Cumulative Annual Supplement, p. 5.

cific partnership property for partnership purposes [only and] * * * has no right to possess such property for any other purpose without the consent of his partners." 59 Purdon's Pa. Stat. Ann. § 72 (1) and 2(a). Finally, a partnership may sue or be sued in its own name (15 Purdon's Pa. Stat. Ann. § 12773),[29] and this right extends to suits "against one or more of the partners" or suits by "one or more partners * * * against the partnership" (12 Purdon's Pa. Stat. Ann., Rule 2129).[30]

These statutory provisions suggesting that a partnership such as petitioner's law firm is a discrete legal

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[29] See, *e.g.*, *Cravath, Swaine & Moore* v. *United States*, No. 73–1066, presently pending an appeal.

[30] Various other provisions of Pennsylvania law accord partnerships the status of juridical personalities. See, *e.g.*, the Uniform Securities Act (70 Purdon's Pa. Stat. Ann., § 1–102 (n)); the Unit Property Act (68 Purdon's Pa. Stat. Ann., § 700.102); the tax for education (72 Purdon's Pa. Stat. Ann., § 7201); the personal income tax (72 Purdon's Pa. Stat. Ann., § 7301), and the Human Relations Act (43 Purdon's Pa. Stat. Ann., § 954). A partnership is also considered an "employer" under the Pennsylvania Workmen's Compensation Act. 77 Purdon's Pa. Stat. Ann., § 21. And the Pennsylvania Supreme Court has recently recognized the independent existence of a partnership, in holding that a foreign partnership could be properly served in that Commonwealth by service upon one of its employees (not a partner). It stated (*Goldstein* v. *Carillon Hotel*, 424 Pa. 337, 341, 227 A.2d 646, 648) that:

> The matters to be considered in determining whether an entity is doing business in the Commonwealth are the same * * * whether the entity be a corporation or a partnership.

Moreover, in promulgating Rule 17(b) of the Federal Rules of Civil Procedure, this Court has recognized that a partnership is a discrete juridical entity, at least for federal question purposes, even in circumstances where local law is to the contrary.

entity are complemented by the provisions in the Internal Revenue Code of 1954 governing the taxation of partnerships. Prior to the enactment of Subchapter K of the Internal Revenue Code of 1954, a partnership was considered to have a "dual nature;" sometimes it was treated as "an aggregate of individual co-owners of property used for a common purpose," and at other times "as a single business entity." Jackson, Johnson, Surrey, Tenen & Warren, *The Internal Revenue Code of 1954: Partnerships,* 54 Colum. L. Rev. 1183 (1954).

Subchapter K of the Internal Revenue Code of 1954 was the first comprehensive statutory treatment of partners and partnerships in the history of the income tax law. "Instead of rigidly adhering to either an aggregate or entity theory, the new law attempt[ed] to incorporate the best features of both approaches" (*id.* at 1236) and explicitly treats a partnership as an entity in respects relevant to this case. For example, Section 6031 of the Internal Revenue Code of 1954 requires partnerships to file their own informational tax returns;[21] Section 706 provides for the partnership's own taxable year and its own accounting system; Sections 705 and 741 provide that the basis of a partner's interest in the partnership is distinct from the partnership's basis in its own property; Section 743 provides that a partner may sell his interest in the partnership without disturbing the partnership's basis in its assets; Section 704(c) generally adopts

[21] The mere co-ownership of property, which is maintained, kept in repair, and rented or leased does not constitute a partnership for tax purposes and does not require the filing of an informational return. See Treasury Regulations, Secs. 1.761–1(a), 1.6031–1(a)(1).

the entity approach for the treatment of contributed property; Section 707(a) specifically adopts the entity approach by generally providing that if a partner engages in a transaction with his partnership, other than in his capacity as a partner, the transaction shall be considered as occurring between the partnership and a stranger; and Section 707(c) applies the entity concept to guaranteed annual payments of salary and interest. See, generally, Jackson, Johnson, Surrey, Tenen & Warren, *supra,* at 1200–1208).[22]

Thus, Subchapter K of the 1954 Code fundamentally adopts the concept that a partnership is an independent legal entity, in conformity with the basic approach of the almost universally adopted Uniform Partnership Act. In similarly relying on the entity concept, therefore, the decision below comports with the essential realities of modern partnership law—in addition to its specific support in the particular legal attributes of partnerships previously discussed.

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[22] In *United States* v. *Basye*, 410 U.S. 441, 448, n. 8, the Court held that for the purpose of reporting its income, the partnership there involved was "regarded as an independently recognizable entity apart from the aggregate of its partners." After noting that there was considerable discussion in the briefs and in the lower court opinions with respect to whether a partnership is to be viewed as an "entity" or as a "conduit", the Court stated that it found itself "in agreement with the Solicitor General's remark during oral argument when he suggested that '[i]t seems odd that we should still be discussing such things in 1972.' " See also *United States* v. *A & P Trucking Co.*, 358 U.S. 121. Of course, the fact that partnerships are not viewed *solely* as entities is immaterial. *United States* v. *White*, *supra*, 322 U.S. at 697, 699–701.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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